



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
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1997/1998 U.S.-Brazil All-Cargo Charter Proceeding	:	Docket OST-97-2243
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FINAL ORDER ALLOCATING CHARTERS

Summary

By this order we make final our tentative decision in Order 97-6-1 and allocate the 750 U.S.-Brazil all-cargo charters available for allocation for the 1997-98 charter year as follows: Southern Air Transport (SAT) - 180; Florida West - 145; Air Transport International - 83; Arrow Air - 29; and Atlas - 35. In addition, we propose to place 278 charters into a pool for *ad hoc* distribution and use under conditions discussed below, and to modify the monthly reporting requirements, as discussed below.

Background

Under the U.S.-Brazil Air Transport Agreement, as amended, U.S. carriers are entitled to operate 750 round-trip all-cargo charter flights per charter year (July through June). By Order 97-6-1, we proposed to allocate the available charters as follows: Southern Air Transport (SAT) - 180; Florida West - 145; Air Transport International - 83; Arrow Air - 29; Atlas - 35, with a charter pool of 278. Objections to our tentative decision were due June 12 and answers to objections were due June 17.

Responsive Pleadings

Air Transport International L.L.C. (ATI) filed an answer and Atlas Air, Inc. filed an objection to our tentative decision. SAT filed an answer to the objections.¹

ATI confirms that it will accept the 83 charter flights tentatively allocated to it by Order 97-6-1, which is fewer than the 204 requested. However, ATI expressed concern that it may use its allocated flights before January 1998 when it is eligible to obtain flights from the charter pool, and urges the Department to make clear that it would grant requests of incumbent carriers for earlier access to the charter pool. ATI contends that the Department did not annualize the 1996-97 historic operations of ATI and Atlas as it did with SAT and Florida West. As a result ATI expressed concern that it would not have enough charters for its full year of 1997/98 services. ATI also suggests that the Department require carriers to specify in their monthly reports whether they operated their allocated flights with their own aircraft or under a wet lease from another carrier. ATI had expressed concern that some carriers may violate the Department's stated policy against wet leasing in capacity-restricted markets on other than an interim or occasional basis, and that the additional information in the reports would make it possible for the Department to ensure compliance with its policy.

Atlas objects to Order 97-6-1 to the extent Atlas' tentative allocation of 35 charters places it at a disadvantage against carriers receiving no allocation. Atlas states that without an advance allocation, it would obtain up to eight flights per month, or 48 charters for the first six months of the charter year. With an advance allocation, it is precluded from obtaining additional flights from the charter pool until January 1, 1998, limiting its operations during the first half of the charter year. Therefore, Atlas requests the Department allocate it at least 48 charters to maintain its operations in the first six months of the charter year.

SAT supports the Department's tentative decision in Order 97-6-1 and requests that the Department finalize its tentative decision as written, in its entirety. In response to the pleadings filed by ATI and Atlas, SAT takes no position.

Final Allocation

We have decided to make final our proposed allocations in Order 97-6-1. We will also make final our proposed conditions on these allocations as well as charters obtained from the charter pool with one minor modification. Specifically, we will modify the monthly

¹ Order 97-6-1 directed SAT, Florida West, ATI, Arrow, and Atlas to notify the Department whether they would accept an allocation of fewer than the number of flights requested. Order 97-6-1 at 7. SAT and Florida West each filed a letter indicating that they would accept the proposed allocations. ATI responded to the Department's directive in its answer to Order 97-6-1. We are further directing Arrow and Atlas to respond by this order.

charter reporting requirements to include information regarding the number of flights operated under wet lease from other carriers.

In our tentative decision, we determined that, based on past experience in allocating Brazil all-cargo charters, the allocations for this charter year should be based on an applicant carrier's past performance in the market. Thus, where carriers operated at least the number of flights allocated for the 1996-97 charter year, we concluded that they should be allocated at least that number this year. We concluded that those carriers had demonstrated the demand for their services and their ability to make full use of the flights. To the extent those carriers operated more flights than they had been allocated, we also concluded that they should be granted an increased allocation. We proposed a formula whereby the increase would be equal to one-fourth of the number of flights that they will have operated in excess of their current year allocation. We also proposed that new entrant carriers that operated at least 20 flights in the 1996-97 charter year be awarded a 1997/98 charter year allocation based on the same formula described above. We tentatively concluded that applicant carriers that did not serve the Brazil market last year or operated fewer than 20 flights should obtain flights from the charter pool for the 1997/98 charter year. Based on this methodology, we proposed to allocate 472 charters to ATI, Atlas, Arrow, Florida West, and SAT for program operations, and to reserve 278 flights in a charter pool for allocation on an *ad hoc* basis.

No party has presented any arguments that persuade us to reach a different result. Indeed, we believe that allocations based on the carriers' historic performance together with a large charter pool will ensure that carriers with historic programs can continue their operations, and that new entrants will have meaningful opportunities to mount competitive programs in the market and to serve the *ad hoc* needs of the market.

In this regard, both ATI and Atlas have expressed concern that they did not receive enough flights for a full year of operations, while SAT and Florida West received allocations based on a full year's operations. As we noted in our show-cause order, historic experience has been a reliable indicator of future operations, whereas basing allocations on other factors, including a carrier's proposed operations--even when the carrier appears to have firm contracts for these operations--has not.² In this case, all carriers' allocations were based on the operations that they had demonstrated they had operated. For SAT and Florida West, this involved service operated over a full year. ATI and Atlas, on the other hand, had demonstrated operations for a partial year only. To annualize these partial year services, as ATI and Atlas have suggested, where these carriers have not established a historical pattern encompassing a full year's operations, would add an element of uncertainty to the allocation that is not justified on the record of this case.

For this same reason, we are not persuaded to allocate Atlas 48 charters to ensure that it can operate at least eight flights per month during the first six months of the charter year because it has "plans" to operate that level of service during that period. After that

² See Order 97-6-1 at 4.

period, Atlas, like all other carriers would have access to the charter pool and could continue its operations with flights from the pool for the balance of the charter year. Atlas, in effect, is asking us to allocate to it sufficient charters to support a level of operations during the first six months of the charter year that it has not demonstrated that it can provide. Indeed, Atlas has served the market since November 1996 and in no one month did it operate more than five flights. Our allocation here to Atlas for 35 flights would accommodate its demonstrated pattern of service in the market for the first six months of the charter year. In addition, awarding Atlas an advance allocation would afford it greater operational flexibility to adjust the level of its monthly services as demand may warrant than would be the case if Atlas had to rely solely on the charter pool. Furthermore, as noted above, after the first six months of the charter year, under the established charter pool procedures, it will have access to the charter pool to continue its operations or to supplement its services if it has not yet used its full allocation.

That said, we recognize that the allocation of 35 flights to Atlas involves fewer flights than Atlas could otherwise obtain if it were not granted an allocation here and operated exclusively from the charter pool. It is clearly not our intent to treat Atlas less favorably than new entrant carriers with immediate access to the charter pool. Atlas, of course, has the option not to accept the allocation here, and to continue to serve the market through the charter pool only as it has in the 1996/97 charter year.³ Should it elect to do so, the returned flights will be added to the charter pool.

We also note that should the need arise, both ATI and Atlas may seek earlier access to the charter pool through the waiver procedures. While we cannot at this time say how we would act on such waiver requests, such waiver requests would be considered under our normal procedures taking into consideration the number of flights in the charter pool at the time, the demonstrated need for additional flights, as well as recalling the record of this proceeding.

Forfeiture and Reallocation Procedures/Reporting Requirements

No party objected to our tentative decision to continue the conditions imposed on allocations since 1992. Therefore, we will make those conditions final, with one minor modification as discussed below. Specifically, this means that carriers must operate at least 40 percent of their allocation within the first six months of the charter year or forfeit a portion of their remaining balance for reallocation through the charter pool. Moreover, we emphasize that each carrier is under a standing obligation to return charters promptly any time that program or *ad hoc* allotment plans change appreciably. Failure to do so in a timely manner could result in reduced allocations in future years. We also remind carriers that once they have applied to the Brazilian Government for the operation of a charter and plans for the operation of the charter change, it is the carrier's responsibility to notify both the U.S. and the Brazilian governments of any changes to original plans as soon as it is

³ We will require that Atlas notify us within five calendar days of service of this order as to whether it intends to accept the allocation awarded here.

known that a flight will be changed and/or canceled. Failure to do so could result in waste of the charters and affect the carrier's ability to continue serving the market.

As we have in the past, we require all carriers allocated flights or receiving flights from the pool to report on their operations for the preceding month by the tenth of each month. In this regard, we have decided to adopt ATI's suggestion, which was unopposed, that we require carriers to specify whether they operated their allocated flights with their own aircraft or whether they wet leased aircraft from other carriers to perform their flights. We will also require carriers to specify how many of the flights they operated themselves and how many were operated under wet leases from other carriers. This information will be helpful to the Department in monitoring use of the Brazil charter allocations and poses no undue burden on the carriers.

ACCORDINGLY,

1. We allocate 750 U.S.-Brazil all-cargo round-trip charters for the period July 1, 1997, through June 30, 1998, as follows:

Southern Air Transport, Inc.	180
Florida West International Airways, Inc.	145
Air Transport International L.L.C.	83
Arrow Air, Inc.	29
Atlas Air, Inc.	35
Charter Pool	<u>278</u>
Total	750 ⁴

2. The carrier allocations in paragraph 1 are subject to the following condition:

Where fewer than 40 percent of a carrier's allocated charters have been used or been committed for use by firm contracts during the six-month period ending December 31, the remaining charter allocations exceeding the number equal to the number of those already operated or committed in the preceding six months will be forfeited and placed in the charter pool;

3. We establish a charter pool subject to the following conditions:

⁴ In our show-cause order, we stated that at the end of the 1996/97 charter year we would review the records and reduce the allocations made in this order by the number of flights wasted by carriers that had received advance allotments for the 1996/97 charter year, and either had not used their full allocation or had not returned them in a timely manner for reallocation to other carriers. Of the carriers receiving advance allocations here, three had advance allocations in the 1996/97 charter year--SAT, Florida West, and Arrow. All have either used their full 1996/97 allocations or returned in a timely manner any unused flights. ATI and Atlas operated flights exclusively from the charter pool. These carriers have also returned any unused flights in a timely manner. Therefore, there will be no need to adjust any carrier's allocation.

(a) Distributions will be made to eligible applicants on a first-come, first-served basis with operations under such distributions limited to eight per applicant per month for each new entrant applicant and four per month for each incumbent applicant until such time after December 31, 1997, that the incumbent carrier has operated 75 percent or more of its total allocated flights, at which time it may apply for up to eight flights per month;⁵

(b) Carriers receiving advance allocations are not eligible applicants until after December 31, 1997. Carriers holding scheduled combination or all-cargo authority in the U.S.-Brazil market are not eligible applicants until after April 30, 1998;

(c) Applications to operate charters may be filed no earlier than 30 days in advance of the flight date; and

(d) Applications must identify (i) the number of flight requested, (ii) proposed flight dates including a four-day service window; (iii) the charterer(s), (iv) the city-pair markets involved by direction, (v) the type of aircraft to be used, and (vi) the type of cargo to be transported. Copies of the charter contract or some form of written evidence of the charter commitment is required at the time a charter is requested;

4. We require that each carrier allocated charters in this proceeding inform the U.S. Air Carrier Licensing Division (X-44), Office of International Aviation, by letter no later than January 2, 1998, of the number of charters it has operated or has committed by firm contracts. For charters under contract, carriers shall indicate the charterer(s), dates, city-pair markets, and nature of traffic and must submit evidence of signed contracts for those charters;

5. We require each carrier allocated flights or receiving flights from the charter pool to notify the U.S. Air Carrier Licensing Division (X-44), Office of International Aviation, no later than the tenth day of each month (or until its charters are exhausted, whichever occurs earlier) of: (1) the number of Brazil all-cargo charters operated during the preceding month; (2) the city-pairs served by direction; (3) the date of each flight; (4) the charterer(s); (5) the type of aircraft used; (6) the type of cargo carried; (7) whether the carrier operated the flight(s) in its own right or with wet-leased equipment, and the number of flights operated by the carrier itself and the number operated by wet lease; and (8) the number of charters for which Brazilian authority was obtained for that month which subsequently were canceled or rescheduled.⁶ Carriers allocated charters shall notify the Department and the Government of Brazil whether or not any charters have been

⁵ A new entrant airline is defined as a U.S. carrier that was not granted an allocation of flights in this proceeding, but does not hold scheduled authority to serve the U.S.-Brazil market; an incumbent carrier is a carrier that has been allocated flights in this proceeding.

⁶ Reports on flights operated from the charter pool under a Notice of Consistency should also identify the date of the Notice granting the flights. A statement should be included as well verifying that the Government of Brazil has been notified in writing of changes and/or cancellations.

operated by the carrier during the month.⁷ After April 30, 1998, each carrier allocated flights from the charter pool is required to report such operations no later than seven days after operation of each flight obtained from the charter pool;

6. We direct Arrow and Atlas to notify the Department within five calendar days of the service date of this order whether they will accept the allocation of flights granted by this order;

7. We delegate to the Director, Office of International Aviation, the authority to administer distribution of flights from the charter pool proposed in this order and, where deemed in the public interest, to waive the restrictions on the charter pool; and

8. We will serve a copy of this order on ABX, Inc.; Arrow Air, Inc.; Atlas Air, Inc.; Air Transport International L.L.C.; Emery Worldwide Airlines, Inc.; Florida West International Airways, Inc.; Fine Airlines, Inc.; Millon Air, Inc.; Southern Air Transport, Inc.; Tower Air, Inc.; World Airways, Inc.; the Ambassador of Brazil in Washington, DC; the U.S. Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration.

By:

PATRICK V. MURPHY
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

⁷ Carriers are advised that they must follow the Brazilian Government's procedures for notification of change or cancellation or be subject to forfeiture of those charters by the Brazilian Government.